No. 17-432

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,

Petitioner,

v.

MICHAEL RESH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ANDREW N. GOLDFARB
Counsel of Record
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
(202) 778-1800
agoldfarb@zuckerman.com

Counsel for Amici

February 28, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE RULE PROPOSED BY PETITIONER COULD BURDEN DISTRICT COURTS WITH DUPLICATIVE CLASS ACTIONS DURING THE TOLLING PERIOD 4

II. DENYING *AMERICAN PIPE* TOLLING TO FOLLOW-ON CLASS ACTION CLAIMS WOULD LIKELY LEAD TO AN INCREASE IN DUPLICATIVE INDIVIDUAL FILINGS BY ABSENT CLASS MEMBERS OF A PRIOR PUTATIVE CLASS THAT WAS NOT CERTIFIED 8

III. DISTRICT COURTS UTILIZE A VARIETY OF TOOLS, INCLUDING COMITY, TO ADDRESS AND PREVENT THE ENDLESS RE-LITIGATION OF CLASS CERTIFICATION 11

CONCLUSION 14

APPENDIX (List of *Amici*) 1a

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) ..... *passim*

Baker v. Home Depot USA, Inc., No. 11 C 6768, 2013 WL 271666 (N.D. Ill. 2013) 12

Baker v. Microsoft Corp., 797 F.3d 607 (9th Cir. 2015), *rev'd*, 137 S. Ct. 1702 (2017) 13

Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799 (7th Cir. 2013) 9

Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017) 6

Church of Scientology of Cal. v. United States Dep't of the Army, 611 F.2d 738 (9th Cir. 1979), overruled on other grounds, *Animal Legal Defense Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016) 11

Colo. River Water Cons. Dist. v. United States, 424 U.S. 800 (1976) 11

EEOC v. Univ. of Pa., 850 F.2d 969 (3d Cir.1988) 11

Heibel v. U.S. Bank Nat'l Ass'n, No. 2:11-CV-00593, 2012 WL 4463771 (S.D. Ohio Sept. 27, 2012) 13

Ott v. Mortg. Inv'rs Corp. of Ohio, 65 F. Supp. 3d 1046 (D. Or. 2014) 12

Palisades Collections LLC v. Shorts, 552 F.3d 327 (4th Cir. 2008) 10

Shady Grove Orthopedic Assocs. v. Allstate Ins., 559 U.S. 393 (2010) 2

Smith v. Bayer Corp., 564 U.S. 299 (2011) 2, 4, 12

OTHER AUTHORITIES

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. reporter's notes (AM. LAW INST. 2010) 12

Restatement (Second) of Trusts § 177 (1959) 7

RULES

Fed. R. Civ. P. 1 ..... 2, 10

Fed. R. Civ. P. 12(f) 13

Fed. R. Civ. P. 23 ..... *passim*

TREATISES

2 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 5:3 (5th ed. 2012) 10

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are former federal district court judges who have experience adjudicating class action cases. The attached Appendix contains a list of the *amici* along with biographical information for each. *Amici* are interested in this case because of their years of service to the federal judiciary and their ongoing commitment to ensure that federal judges have the means to manage their caseloads and dispense equal justice under law to all litigants.

Amici urge the Court to uphold the decision below and to hold that, upon the failure of an earlier class action that tolled the claims of absent class members pursuant to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), an absent class member acting within the tolled period may subsequently file a class action complaint and is not limited to pursuing an individual claim.[2]

SUMMARY OF ARGUMENT

This Court has repeatedly instructed that Rule 23 of the Federal Rules of Civil Procedure "*automatically* applies 'in all civil actions and proceedings in the United States district courts.'" *Shady Grove*

---

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] *Amici* take no position on the merits of this or other class actions.

Orthopedic Assocs. v. Allstate Ins., 559 U.S. 393, 400 (2010) (quoting Fed. R. Civ. P. 1) (emphasis in original). While complex and time-consuming, class actions are an efficient mechanism to adjudicate common claims that affect numerous individuals or entities. That remains the case even in circumstances where a class action is timely only because a prior (failed) class action tolled the claims of the putative class members under the rule of *American Pipe*.

Amici acknowledge Petitioner's concerns about "stacked" class actions. In many instances, permitting a follow-on class action outside the original limitations period may not be just or prudent. District judges have ample means to identify such cases and to decline requests to adjudicate them on a collective basis. And decisions after *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), in which this Court instructed federal courts to employ "principles of *stare decisis* and comity" to mitigate the effects of repetitive litigation, show that district courts have used the tools available to them. But a rule that bans class actions, in all situations, from the reach of *American Pipe* tolling would not promote justice. Such a rule would impair the integrity and symmetry of the Federal Rules of Civil Procedure and needlessly deny litigants access to a form of aggregate litigation that is also an important case-management device for district judges.

A holding by this Court that the *American Pipe* rule does not apply to a subsequent class claim by a member of a prior, putative class action could cause unnamed class members in pending and future class actions, before the expiration of the statute of limitations or statute of repose, to file (i) protective

class actions, simply to preserve their claims, or (ii) individual actions with greater frequency after the failure of a putative class action, since absent class members will not have their claims preserved by the filing of a class claim. The early protective class filings may complicate the already difficult process of choosing a lead plaintiff, including in securities cases, by forcing a district court to address more plaintiffs who seek to represent the putative class. Further, a substantial increase in multidistrict litigations could ensue if unnamed class members choose to file independent class suits in districts most convenient for them, but which might differ from the district in which the class case is proceeding. A single, consolidated class action could thus become subject to an MDL procedure that would expend more of the judiciary's time and resources than necessary.

Finally, a flat ban on class actions while individual actions are still cognizable could lead to unjust results. If the individual claims are meritorious but too costly or complex to adjudicate on an individual basis, it is hard to see why they should be rendered worthless merely because a prior class action failed on technical grounds. Alternatively, in some cases the individual claims will be both meritorious and economical, in which case courts might expect an onslaught of individual claims. Again, it is difficult to see why litigants should be prohibited from seeking, or courts from adjudicating, those claims on a class basis within the strictures of Rule 23. Indeed, the defendant might want to proceed on a class basis, and Rule 23 accommodates that possibility. It is not clear how Petitioner's proposed rule would operate in unusual but not inconceivable circumstances such as counterclaim class actions and

defendant class actions, and whether it would preclude or discourage some class litigation that would be beneficial to all parties. In the view of *amici*, prudence warrants leaving district judges with discretion—to be exercised with due regard for this Court's instruction in *Smith v. Bayer*—to grant or deny class certification for either party, in view of all the circumstances, including those that prompted the failure of the prior class action or actions.

ARGUMENT

I. THE RULE PROPOSED BY PETITIONER COULD BURDEN DISTRICT COURTS WITH DUPLICATIVE CLASS ACTIONS DURING THE TOLLING PERIOD

Class actions present a range of particular challenges for federal district courts to manage.

Even before they can consider the merits of class certification, district courts encounter early case management issues that are often complex and hotly contested. For example, courts must decide how to efficiently manage and resolve the spate of class filings that follow an event that might have harmed hundreds or thousands (or even tens of thousands) of individuals or entities in similar fashion. In certain types of class actions, such as securities class actions subject to the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("PSLRA"), district courts must oversee the fierce competition among plaintiffs or groups of plaintiffs vying to be the lead. District courts must also consider whether to consolidate multiple actions for pretrial proceedings under the aegis of the Panel on Multidistrict Litigation.

After addressing the early-case management issues, and determining a plan for class discovery, district courts must decide whether to certify a class by applying Rule 23(a) and 23(b) to determine whether class treatment is appropriate. Under Rule 23(a), this includes determining whether the named plaintiff has claims that are typical of those of the proposed class, whether the named plaintiff and proposed class counsel can adequately represent the class, and whether there are questions of law or fact that are common to the class and susceptible to proof by common evidence. Fed. R. Civ. P. 23(a). District courts must also ensure that the class fits one of the types of classes under Rule 23(b). And district courts must do this all while ensuring that the rights of absent class members are adequately protected.

While class actions present administrative challenges, they remain an important way for district courts to resolve claims that, if litigated plaintiff by plaintiff, would clog the district courts with myriad overlapping if not identical actions.

In *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court concluded that the running of a statute of limitations should be suspended for the claims of absent class members during the pendency of a class action complaint. Each of those decisions was grounded in part on the concern that a contrary rule would induce potential class members "to file protective motions to intervene or to join in the event that a class was later found unsuitable." *American Pipe*, 414 U.S. at 553; *see also Crown, Cork & Seal*, 462 U.S. at 353-54. In essence, the *American Pipe* rule vindicates the case management principles embedded in Rule 23. *Cal.*

Pub. Emps. Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2051 (2017) (citing *American Pipe*, 414 U.S. at 556). As the Court observed in *American Pipe*, a "federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550.

In the experience of *amici*, *American Pipe* tolling has played a salutary role for district courts' management of class action while protecting the rights of absent class members. The *American Pipe* rule promotes efficient administration of justice by making it unnecessary for absent members of the putative class to file protective actions or intervention motions once a class action encompassing their claims has been filed.

The rule urged by Petitioner would diminish these benefits. Class members would have to worry that a pending class action will fail, such as on procedural or technical grounds, and the statute of limitations will thereafter bar further class-based claims. Cautious class members therefore may file protective class actions, perhaps in the same district and perhaps in other districts. As a result of the PSLRA's publication requirement, potential members of securities class actions may receive early notice of the litigation and ready access to counsel. When a securities class action is filed, plaintiffs' lawyers have an obligation, as well as an incentive, to notify potential class members of the action. Many of these potential class members contact one or more of the plaintiffs' firms who are competing to represent the lead plaintiff. If this Court finds Rule 23 inapplicable to claims timely brought after the expiration of

American Pipe tolling, it seems likely that plaintiffs' counsel will advise potential class members that they *cannot* merely sit by and assume that their rights are protected.

In the context of securities class actions, many securities are held through funds operated by professional managers. Investment managers are fiduciaries who have a duty to keep investors informed of rights and opportunities associated with their investments. *See* RESTATEMENT (SECOND) OF TRUSTS § 177 (1959) ("The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust."). As a result, they are likely to monitor Business Wire and other sites that publish notices of class action filings. After learning of a class action involving securities held by their investors, investment professionals may feel obligated to tell their clients—particularly those whose claims may be too small to justify individual actions—that they should form a judgment about whether the filing of a protective class action complaint is advisable. At minimum, this imposes additional costs on investors, and it could impose additional burdens on the courts if investment professionals push investors to protect their rights by filing class complaints.

Amici cannot quantify the anticipated rise in separate class filings if the Court holds that *American Pipe* tolling extends the statute of limitations only for individual claims but not class claims. But protective class actions will cause needless administrative and possibly substantive burdens on district judges as they ascertain how to manage them during the pendency of another class

action addressing the same topic. Of course, district courts have the ability to stay or transfer common claims, and *amici* are unaware of data that would illuminate just how many protective class actions would be filed if Petitioner's rule prevails. But *amici* believe there is no reason to tempt fate when other solutions are readily available.

II. DENYING *AMERICAN PIPE* TOLLING TO FOLLOW-ON CLASS ACTION CLAIMS WOULD LIKELY LEAD TO AN INCREASE IN DUPLICATIVE INDIVIDUAL FILINGS BY ABSENT CLASS MEMBERS OF A PRIOR PUTATIVE CLASS THAT WAS NOT CERTIFIED

Amici are also concerned that Petitioner's proposed rule would create problems of case management and fairness in the post-tolling period, when individual claims remain cognizable but class claims, according to Petitioner, are extinguished. Like many class-action defendants, Petitioner no doubt believes that the elimination of the class action device will result in reduced liability and expense because only a small fraction of absent class members will file individual claims. This may well be true, because one of the chief purposes of Rule 23 is to provide a mechanism for adjudicating claims that are too small to pursue on an individual basis. But it is difficult to justify Petitioner's rule on an abstract scale of justice. Under the rule adopted by the Ninth Circuit in this case, a defendant will be subject to what is effectively an extended statute of limitations for both class actions and individual actions—actions raising issues that the defendant already knows about from the prior action in which a class was not certified. On the other

hand, were Petitioner to prevail, plaintiffs with small-value claims would effectively be left without any meaningful remedy because the cost of filing and pursuing an individual claim exceeds its potential benefit. Weighing those two outcomes, fairness suggests that class actions should be allowed.

If, however, individual claims of absent class members are cost effective, then presumably many will be filed within the limitations period tolled under *American Pipe*. Here too it is difficult to see why the elimination of the class device is prudent or fair. For district judges, the management of a single class action is usually easier than 1,000 individual actions filed by individuals who would ordinarily be members of a class. Indeed, as a condition of certifying a class under Rule 23(b)(3), a district court must find that a class action would be a superior method for fairly and efficiently adjudicating the controversy. For plaintiffs as well the benefits are obvious. But even defendants have some grounds to retain the class device in this situation. In some cases defendants may prefer a class action over manifold individual actions. *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) (where defendant argued that most washing machine purchasers did not experience mold problems, "that was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears—a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment"). In many cases the class device permits a class settlement that is the optimal result for all parties. In addition, class actions are sometimes asserted as counterclaims, in particular in

response to debt collection actions by large corporations. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008). Eliminating that possibility could leave consumers without an important defense in some situations. Rule 23 also permits "defendant class actions," in which the plaintiff impels a group of defendants to litigate as a class. See 2 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 5:3 (5th ed. 2012) (observing that certain securities cases are litigated as defendant class actions because of economies achieved by one rather than multiple determinations of whether a registration statement contained a material misrepresentation). It is not clear what if any effect Petitioner's proposed rule would have on such actions. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue *or be sued* as representative parties ....") (emphasis added).

Amici believe Petitioner's proposed rule would impair the symmetry and balance of Rule 23 in particular and the Federal Rules of Civil Procedure as a whole. Eliminating one component of the rules from certain types of actions will lead to mischief and injustice in particular situations. *Amici* believe it is better to allow litigants to avail themselves of all forms of actions allowed under the Federal Rules, and let the district courts decide, on a case-by-case basis, the litigation form that promotes a just, speedy, and inexpensive resolution. Fed. R. Civ. P. 1.

Again, *amici* cannot quantify the number of individual post-tolling filings that are likely to occur if this Court were to reverse the decision below and hold that a subsequent class action cannot benefit from *American Pipe* tolling. But from the standpoint

of efficient judicial administration, denying litigants access to Rule 23 is likely to force district courts to manage more, essentially identical claims, or will leave individuals with smaller claims without a practical mechanism for pursuing redress.

III. DISTRICT COURTS UTILIZE A VARIETY OF TOOLS, INCLUDING COMITY, TO ADDRESS AND PREVENT THE ENDLESS RE-LITIGATION OF CLASS CERTIFICATION

Petitioners refer to comity as a "loose doctrine" with the potential to prevent duplicative class litigation that is "weak at best." Pet. Br. at 49. But a doctrine that is subject to the discretion of district courts is not thereby toothless: courts recognize that judicial efficiency and avoiding conflicting judgments among federal courts are important values, and apply comity-based doctrines to further those objectives. *E.g.*, *EEOC v. Univ. of Pa.*, 850 F.2d 969, 971-72 (3d Cir.1988) (discussing contours of "first-filed" rule); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (in relations among federal district courts, "the general principle is to avoid duplicative litigation"); *Church of Scientology of Cal. v. United States Dep't of the Army*, 611 F.2d 738, 750 (9th Cir. 1979) (applying comity doctrine flexibly to defer to decision in later-filed action in another district, recognizing that the purpose of comity is "to avoid placing an unnecessary burden on the federal judiciary, and to avoid the embarrassment of conflicting judgments") (citation omitted), overruled on other grounds, *Animal Legal Defense Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016).

And district courts' decisions in wake of *Smith v. Bayer* show that district courts have taken seriously this Court's instruction to exercise comity. Decisions on follow-on class actions confirm that the district courts are fully capable of limiting repeat litigation of failed class claims, while making considered judgments about follow-on class claims that differ in a meaningful respect from the prior failed class and thus are inappropriate for summary rejection. Respondents' brief (at 41-43) identifies examples of both types. For example, in *Baker v. Home Depot USA, Inc.*, No. 11 C 6768, 2013 WL 271666, at *5 (N.D. Ill. Jan. 24, 2013), the plaintiffs brought class claims on behalf of purchasers of chemically treated wood. The defendant moved to strike the class claims, asking the court to apply principles of comity to decisions of five other courts that had declined to certify a class in "materially identical" cases. The district court granted the motion, finding that the class allegations suffered the same deficiencies under Rule 23(a) and 23(b)(3) as the other cases. And in *Ott v. Mortg. Investors Corp. of Ohio, Inc.*, 65 F. Supp. 3d 1046, 1063-64, 1066 (D. Or. 2014), the district court considered itself "compelled to honor the principles of comity" "in order to save the resources of the courts and parties." The *Ott* court viewed the denial of certification of the same class in a prior case as setting "a rebuttable presumption against certification of the same classes in this court."[3] Even

[3] As Respondents note, the American Law Institute has suggested a standard by which to exercise comity: a district court should give a "rebuttable presumption" of correctness to a prior court's non-certification decision when deciding whether to certify a similar class. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. reporter's notes (AM. LAW INST. 2010).

though, "were th[e] court writing on a clean slate, it would agree with plaintiffs' interpretation" of the law, the district court applied comity to follow the prior decision of a fellow district court in the Ninth Circuit and dismissed the plaintiff's class claims.

On the other hand, comity does not (and should not) require that district courts give dispositive weight to the decisions of prior courts addressing the certification of a similar, even identical class, particularly where such prior decisions rest on grounds that do not go to the fundamental certifiability of the class. Thus, in the wake of *Smith v. Bayer*, district courts have also found sound reasons to break from past decisions where the follow-on case is distinguishable in a meaningful respect. *See, e.g., Heibel v. U.S. Bank Nat'l Ass'n*, No. 2:11-CV-00593, 2012 WL 4463771 (S.D. Ohio Sept. 27, 2012).

When a district court agrees, in the exercise of comity, that a follow-on class action suffers similar or identical defects as a prior failed class, the Federal Rules give the court procedural tools to prevent further re-litigation of class certification. *See* Fed. R. Civ. P. 12(f); Fed. R. Civ. P. 23(d)(1)(D) (district court may issue orders that "require that the pleadings be amended to eliminate allegations about representation of absent persons").

Amici reiterate that they are neutral about the substantive issues raised by the parties in this litigation. Based on their collective experience and

---

See also Baker v. Microsoft Corp., 797 F.3d 607, 617-19 (9th Cir. 2015) (Bea, J., concurring in the result), *rev'd and remanded on other grounds*, 137 S. Ct. 1702 (2017).

judgment, however, *amici* believe that affirming the court below and finding that *American Pipe* tolling applies to claims brought under Rule 23, not just individual actions, would facilitate the efficient administration and management by district courts of the disputes brought before them.

CONCLUSION

For the reasons stated, the Court should sustain the decision below.

Respectfully submitted,

ANDREW N. GOLDFARB
Counsel of Record
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
202 778 1800
agoldfarb@zuckerman.com

APPENDIX

APPENDIX

List of *Amici*

The Hon. Frank C. Damrell, Jr. (ret.) served on the United States District Court for the Eastern District of California from 1997 to 2011. He served on the Judicial Panel on Multidistrict Litigation from 2008 to 2011. Judge Damrell is currently a mediator and arbitrator with JAMS.

The Hon. William Royal Furgeson, Jr. (ret.) served on the United States District Court for the Western District of Texas from 1994 to 2013. He served on the Judicial Panel on Multidistrict Litigation, was President of the Federal Judges Association, and was a member of the Judicial Resources Committee of the Judicial Conference of the United States. Judge Furgeson is currently Dean of the University of North Texas at Dallas College of Law.

The Hon. Nancy Gertner (ret.) served on the United States District Court for the District of Massachusetts from 1994 to 2011. Judge Gertner is currently a Professor of Practice at Harvard Law School.

The Hon. G. Patrick Murphy (ret.) served on the United States District Court for the Southern District of Illinois from 1998 to 2013, including serving as chief judge from 2000 to 2007. Judge Murphy is currently a partner at Murphy & Murphy, LLC.

The Hon. T. John Ward (ret.) served on the United States District Court for the Eastern District of Texas from 1999 to 2011. He served on the Judicial Conference Committee on Court Administration and Court Management from 2003 to 2009. Judge Ward is currently Of Counsel to Ward Smith & Hill, PLLC.

The Hon. Alexander Williams, Jr. (ret.) served on the United States District Court for the District of Maryland from 1994 to 2014. Judge Williams is currently on the faculty of the Howard University Law School.